In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-26

THOMAS QUINN AND GARY SEIDEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners Quinn and Seiden and eight co-defendants were indicted on 99 counts charging conspiracy to violate and substantive violations of the Federal Securities Laws and the mail fraud statutes (15 U.S.C. 77e(a), 77q(a), 77x, 78i(a)(2), 78ff(a) and 18 U.S.C. 1341 and 1343). Petitioners were both convicted on Count 1 (conspiracy); Quinn was convicted on Counts 10 and 20 through 24 (specific stock sales) and on Counts 57, 78, and 79 (sales of unregistered stock); and Seiden was convicted on Counts 22, 23, 24, 78 and 79, and acquitted on Count

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57. Quinn was given concurrent sentences of two years, execution of which was suspended on all but six months, and he was placed on probation for one year. Seiden was given concurrent sentences of one year, execution of which was suspended on all but two months. The court of appeals affirmed (Pet. App 11–22).

The charges against petitioners arose out of the sale of stock of Kent Industries, Inc. (Kent), during 1962 and 1963. Quinn, an attorney, was the president of an over-the-counter broker-dealer, Thomas, Williams and Lee, Inc. (TWL), during this period. Seiden was a salesman with TWL, and also had certain accounting duties. The government's evidence showed that the Kent stock was required to be registered before trading, and that petitioners participated in sales of unregistered Kent stock and made fraudulent misrepresentations in connection therewith. (Pet. App. 12–15.)

Petitioners' only contention here is that preindictment delay entitled them to have the indictment dismissed. The Securities and Exchange Commission began an investigation of TWL's sales of Kent stock in 1963, and continued its examination until 1966. Though a Commission hearing examiner recommended in January, 1966, that Quinn, Seiden and other TWL salesmen be barred from the securities business, the Commission did not refer the case for criminal prosecution. In the spring of 1966 the United States Attorney initiated an independent investigation concerning possible criminal violations. The indictment against

petitioners was returned on May 28, 1968, after that investigation was completed. Petitioners were tried and convicted in June 1970.[1] Prior to the trial, they moved to dismiss the indictment on the ground that they had been improperly denied their constitutional right to a prompt trial. The district court denied this motion (*United States* v. *Quinn,* 314 F. Supp. 233 (S.D. N.Y.)), as well as similar motions at the trial and at the time of sentencing.

While the question whether preindictment delay may require dismissal of the indictment is before this Court in *United States* v. *Marion,* No. 70–19, this Term, there is no need to withhold action on this petition pending a decision in that case because, contrary to petitioners' claim, they were not prejudiced by the delay.[2] They assert that the delay deprived them of important exculpatory testimony of three witnesses, all of whom died before trial. The government showed that this assertion was groundless, and the district court agreed in the following language (314 F. Supp. at 234):

> The defendant Quinn asserts that the pre-indictment delay has deprived him of the testimony of three individuals [redacted] of whom died in July, 1966, and the other two in 1967. Despite

[1] Petitioners do not assert improper *post*-indictment delay, as indeed they could not on the record in this case. Motions were decided by the district court approximately five months after indictment (on November 8, 1968), and the trial began on June 22, 1970, following a one month delay requested by Quinn.

[2] See our briefs in opposition in *Heard* v. *United States,* No. 71–21, O.T. 1971, and *Kroll* and *Cala* v. *United States,* Nos. 1314 and 1435, O.T. 1970, certiorari denied, May 3, 1971.

> the fact that two were named as co-conspirators, he asserts that all three would have offered exculpatory evidence upon a trial. Other than Quinn's bare assertion, no evidential matter supports the claim. To the contrary, it appears that one, in the course of an official inquiry into Kent transactions, invoked his constitutional privilege against self-incrimination and another, in a civil proceeding, denied under oath having had any conversation with anyone about the stock. Moreover, even under the defendant's version, the alleged representations and assurances made to him by the deceased witnesses in regard to Kent Industries, Inc. were accompanied by or related to public reports, financial statements, balance sheets and other documentary material which should still be available for use by the defendants upon the trial in the event the government does not introduce them. * * *

The court of appeals also pointed out that the testimony that these witnesses purportedly would have given was of "quasi-nebulous relevance", and that "neither Quinn nor Seiden thought enough of the Marotta, Lekocas, Check [the three witnesses] testimony in relation to integrity of the Kent stock sales as to call them during the SEC investigation" (Pet. App. 16).

We should add that here the prosecutor did not postpone action he otherwise could have taken, and accordingly there was no "delay" in seeking the indictment against petitioners. The information gathered by the Securities and Exchange Commission

did not result in the criminal charges against petitioners, or even a Commission reference for prosecution. Instead, the United States Attorney made a further careful investigation and only after that was completed could he determine "the need for and extent of criminal charges to be brought" against petitioners as a result of their activities involving "wide-ranging securities distribution schemes." *United States* v. *Parrott*, 425 F. 2d 972, 975 (C.A. 2), certiorari denied, 400 U.S. 824. The indictment was returned promptly following that investigation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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